

- “A. Whether the Administrative Law Judge exceeded his authority in refusing to consider evidence presented by the employer at the preliminary hearing held May 14, 1998. More particularly, whether the Administrative Law Judge exceeded his authority in refusing to consider evidence submitted by the respondent and its insurance carrier in violation of K.S.A. 44-534a(a)(2) which specifically affords the opportunity to present which [sic] evidence where issues of temporary total disability are decided, and in pejoratively characterizing the presentation of such evidence as ‘stupid’.
- “B. Whether the Administrative Law Judge exceeded his authority in determining that the employer had ‘surrendered the capacity to accommodate’ the claimant where, by the claimant’s own admission, the claimant was terminated for cause.

- “C. Whether the Administrative Law Judge exceeded his jurisdictional authority in ordering temporary total disability for a specific period of time while the claimant was ‘under treatment by Dr. Storm’ but made no determination that the claimant was temporarily totally disabled under the definition for temporary total disability contained in K.S.A. 44-510c(b)(2), particularly in light of the sworn affidavit of the employer indicating that accommodated light-duty, or one-handed, work would have been readily available to claimant had she not been terminated for cause **prior** to making her claim.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

This matter was earlier brought to the Appeals Board on Respondent’s appeal from the Administrative Law Judge’s Order of December 22, 1997. At that time, the Appeals Board found that claimant had proven accidental injury arising out of and in the course of her employment and just cause. The original Order of December 22, 1997, granted temporary total disability “for the period treatment extends.” This current matter went before the Administrative Law Judge upon claimant’s motion for penalties which claimant agreed to dismiss if the Administrative Law Judge would order temporary total disability compensation for the ten (10) weeks in question. As the Administrative Law Judge did order the temporary total disability compensation, claimant waived the request for penalties. The claimant’s entitlement to temporary total disability compensation is the only issue currently on appeal before the Appeals Board.

K.S.A. 1996 Supp. 44-551 allows for reviews by the Appeals Board of preliminary hearing orders if it is alleged that the Administrative Law Judge exceeded his jurisdiction in granting or denying the relief requested. Respondent first argued that the Administrative Law Judge exceeded his authority by refusing to consider evidence submitted by the respondent in violation of K.S.A. 1996 Supp. 44-534a(a)(2) which states in part:

The administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except . . . no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.

In this instance, the respondent submitted an affidavit from the plant manager, David Padgett, discussing respondent’s willingness to accommodate Dr. Storms’ light-duty restrictions and discussing the reason for claimant’s termination of employment. Respondent argues the Administrative Law Judge refused to consider the evidence from this sworn statement, characterizing it as “stupid.” Respondent’s argument fails. In order

for the Administrative Law Judge to have characterized the affidavit as “stupid”, the Administrative Law Judge would first have to have read the affidavit and considered its contents. The weight given that affidavit by the Administrative Law Judge is within his jurisdiction and authority, pursuant to K.S.A. 1996 Supp. 44-534a. Therefore, the Appeals Board finds that the Administrative Law Judge did not exceed his authority or jurisdiction when considering respondent’s affidavit, and respondent’s Issue A is dismissed.

The respondent objects to the Administrative Law Judge’s determination that respondent had “surrendered the capacity to accommodate” the claimant regardless of the fact that claimant was terminated for cause. The period of temporary total being requested includes the ten (10) weeks during which time claimant underwent both left and right carpal tunnel surgery, and the recovery time. The issue presented by respondent deals with the Administrative Law Judge’s decision to award temporary total disability compensation during a time when respondent contended that it would have been willing to provide light duty to claimant but for the fact claimant was terminated for cause. While there may be a dispute regarding claimant’s entitlement to temporary total disability compensation, it is nevertheless the Administrative Law Judge’s right, under K.S.A. 1996 Supp. 44-534a, to award temporary total disability compensation from a preliminary hearing. It is not within the jurisdiction of the Appeals Board to consider an award of temporary total disability compensation on an appeal from a preliminary hearing. Therefore, the Appeals Board finds it does not have the jurisdiction to consider respondent’s Issue B, and it is dismissed.

Finally, the respondent alleges the Administrative Law Judge exceeded his jurisdiction in ordering temporary total disability compensation while claimant was under the treatment of Dr. Storm, because Dr. Storm made no determination that claimant was temporarily totally disabled pursuant to K.S.A. 44-510c(b)(2). K.S.A. 44-510c(b)(2) defines temporary total disability compensation as “when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.”

The dispute centers around whether claimant would have been accommodated with light-duty, or one-handed duty, work by the respondent had she not been terminated for cause. Again, the issue is claimant’s entitlement to temporary total disability compensation in light of the evidence presented to the Administrative Law Judge. Again, the Appeals Board does not have jurisdiction to consider an order of temporary total disability compensation regardless of the factual disputes which lead to that order. K.S.A. 1996 Supp. 44-551 and K.S.A. 1996 Supp. 44-534a are specific in what can and cannot be appealed from a preliminary hearing order, and the award of temporary total disability compensation is not an appealable issue. The Appeals Board, therefore, finds that it does not have the jurisdiction to consider respondent’s Issue C, and same is dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Robert H. Foerschler dated May 14, 1998, remains in

full force and effect, and respondent's appeal with regard to Issues A, B and C are hereby dismissed.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

c: John G. O'Connor, Kansas City, KS
D'Ambra M. Howard, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director